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Research Brief: Wire Act New Hampshire Case Ruling

June 4, 2019

On the afternoon of June 4th, a ruling was issued by United States District Judge Paul Barbadoro in the case between the New Hampshire Lottery Commission and Neopollard, a lottery vendor, against the U.S. Department of Justice (“DOJ”) regarding the Interstate Wire Act of 1961. The suit was brought by New Hampshire in response to the memorandum issued by the DOJ’s Office of Legal Counsel (“OLC”) on November 2, 2018 (the “2018 Memo”), which stated that the Wire Act applied to all forms of gaming and not just sports betting, reversing a previous opinion issued in 2011 (the “2011 Memo”). The 60-page ruling in the New Hampshire case confirmed the 2011 Memo, stating that the Wire Act applies only to sports betting and setting aside the 2018 Memo. The result in the New Hampshire case represents a shot across the bow of the authors of the 2018 Memo and others, in the DOJ and elsewhere, who have pushed this agenda for the last several years.

The case was one that many throughout the gaming and lottery industries had been watching since the 2018 Memo was released earlier this year. After the 2018 Memo was released, the DOJ offered a 90-day window before enforcement of the Memo would go into effect, which meant that enforcement should have commenced on April 15, 2019. The DOJ extended that deadline another 60 days earlier this spring, pushing the end of the non-prosecution period to June 14, 2019.

Several states joined New Hampshire in their case against the DOJ. Nevada, which offers online gaming and mobile sports wagering, could have been affected by the ruling but never joined as a party to the case. Many industry experts continue to question the lack of involvement by the Nevada Attorney General’s Office in such an impactful and important case for the gaming and lottery industries.

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Judge Barbadoro had several key statements in his ruling that addressed many issues, including New Hampshire’s standing to bring the case, the merits of the arguments presented in the 2018 Memo, and the 2018 Memo’s overall usefulness going forward. In his opening, Judge Barbadoro states:

As I explain below, I agree with the plaintiffs that they have standing to sue. Based on the text, context, and structure of the Wire Act, I also conclude that the Act is limited to sports gambling. Accordingly, I deny the Government’s motions and grant the plaintiffs’ motions for summary judgment.

In issuing his ruling, Judge Barbadoro focused a substantial portion of his opinion on the interpretation of the first clause of § 1084(a). He noted, and rejected, the DOJ’s reliance on “rule of the last antecedent,” a well-established judicial principle used in construing statutes. Interestingly, he also rejected another canon of statutory interpretation advanced by New Hampshire, the “series qualifier” canon, stating that “[t]he absence of clarifying punctuation prevents the first clause from being a textbook application of either canon.”

After reviewing the Wire Act’s context, structure, coherence and legislative history, Judge Barbadoro determined:

In sum, while the syntax employed by the Wire Act’s drafters does not suffice to answer whether § 1084(a) is limited to sports gambling, a careful contextual reading of the Wire Act as a whole reveals that the narrower construction proposed by the 2011 OLC Opinion represents the better reading. The Act’s legislative history, if anything, confirms this conclusion. Accordingly, I construe all four prohibitions in § 1084(a) to apply only to bets or wagers on a sporting event or contest.

Judge Barbadoro concluded his ruling by emphasizing that the Wire Act only applies to sports betting and that the 2018 Memo would be set aside, leaving the 2011 Memo as the operative interpretation of § 1084(a) of the Wire Act:

I hereby declare that § 1084(a) of the Wire Act, 18 U.S.C. § 1084(a), applies only to transmissions related to bets or wagers on a sporting event or contest. The 2018 OLC Opinion is set aside.

While the Court’s conclusion is clear, it is important to note that the judgment is limited, by its terms, to the case before the Court; Judge Barbadoro specifically stated that he would not be issuing a nationwide injunction and that the judgment did not apply to those States that filed *amicus* briefs with the New Hampshire court. While there is plenty of precedent for the issuance



of nationwide injunctions by District Courts, Judge Barbadoro concluded that such injunctions are not an appropriate form of relief in such cases.

Notwithstanding the limitation on the scope of the opinion, the opinion is quite well-written and well-reasoned and provides solid evidence that the DOJ's 2018 Memo and the memos outlined by the Committee to Stop Internet Gaming ("CSIG"), as reported by the Wall Street Journal earlier this year, were at best a straw house that failed to stand up to the huff-and-puff of judicial scrutiny. Global Market Advisors ("GMA") agrees with this view, as it stated in its research brief from January 2019.

THE 1961 WIRE ACT

The United States Congress passed the Wire Act in 1961, which specifically banned the transmission of sports wagers across state lines. It was passed as part of a series of anti-racketeering laws, including the Illegal Gambling Business Act, the Interstate Transportation of Wagering Paraphernalia Act, and the Travel Act. The Wire Act was designed to aid states in enforcing state-specific bookmaking and gambling laws focused on helping the DOJ battle organized crime and trafficking during the Kennedy Administration.

Specific language from the Wire Act included a criminal provision:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

Significant technological advances have been made since the law was enacted over fifty years ago, allowing state governments to better recognize legal versus illegal activities. Many have interpreted language in the Wire Act to prohibit the use of the internet for transmission of sports bets or wagers, along with information assisting in the placement of such bets or wagers, subject to certain exceptions. It is important to note that the internet did not exist in 1961 as it does today, and the Wire Act itself does not specifically discuss how it may apply to other forms of gambling. As such, the law has been open to interpretation, but the most recent ruling puts the focus back on the sports betting front as opposed to those opinions that the Wire Act applies to everything transmitted via a "wire."



The one thing that is likely is that this debate will continue to move forward until one of two things happens legislatively. The first would be to create a modern version of the Wire Act that addresses modern technology as well as the current gaming environment. The second would be to create a secondary act similar to the Interstate Horse Racing Act of 1978, which has subsequently been amended since its original passage. Judicially, the only continued action that is expected is for this case to be heard ultimately by the U.S. Supreme Court. However, it is likely that similar arguments could be heard by other District Courts that may or may not agree with Judge Barbadoro's decision, which could potentially add to the dynamics of this issue through the judicial system.

POTENTIAL NEXT STEPS

The biggest winners out of this week's ruling are the gaming and lottery industries that can take some comfort in the fact that the New Hampshire ruling is both well-researched and well-reasoned, though it will be interesting to see if the DOJ will appeal. As stated during oral arguments in April, the next steps for stakeholders in the gaming and lottery industries would depend on the language of the ruling. Now that the language and reasoning are clear, stakeholders would be well-advised, on the judicial side, to continue filing cases in an effort to obtain additional favorable rulings based on the reasoning in the New Hampshire case.

The challenge that remains is what will be done next through the Committee to Stop Internet Gaming, which tried to join the New Hampshire v. DOJ case late in the process. CSIG believed that they had a solid victory back in January, which had many of their team "spiking the football" with members of Congress and with numerous legislators in states where they had actively played to restrict internet gaming.

One of the group's key players, former Nebraska Attorney General Jon Bruning, [testified](#) before a Congressional hearing in September 2018, stating that Congress needed to act on the issue to provide federal guardrails that would work in conjunction with states to put protections in place while allowing states to earn revenue from legal online sports books and gambling. Through his testimony, he continued to advocate for the Wire Act to be restored, as well as the enforcement of other federal acts including UIGEA to combat the illegal market. One would assume that their efforts will continue to push forward to find legislative or potentially judicial solutions that they would accept. Global Market Advisors had predicted for some time that the reversal of the 2011 Memo would occur during the Trump Administration through the efforts of CSIG, and GMA firmly believes that CSIG will continue to seek a federal "solution" on internet gaming. The past few months have proven that this group, while offering a minority opinion within the gaming



industry, should not be ignored. The great portion of the industry should coalesce behind their own legislative solution to prevent the uncertainty that continues and the commotion that has occurred over the last five months.

As stated in a previous research brief issued in January 2019, Global Market Advisors believes that this issue should not be governed by executive order or interruption through memo. The United States is well overdue to actually legislate policy and let the courts reach conclusions on the laws that are on the books. The courts did that in part this week, but this is likely far from the end of the judicial route. The separation of powers between the three branches should prevent the Executive Branch from interrupting the law beyond the regulations it may be prescribed to develop based off of legislative intent. The challenge still remains in passing legislation at the federal level to develop a modern-day version of the Wire Act and end the back-and-forth debate over such an act that does not take into account the modern telecommunications world. As with any piece of legislation, the good comes with the bad, and it may take years to address this issue through legislation or through lawsuits within the judicial system.



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